



November 30, 2020

The Honorable Jeff Leach
Chairman, House Committee on Judiciary and Civil Jurisprudence
Texas House of Representatives
ATTN: Ms. Cassidy Zgabay, Committee Clerk
P.O. Box 2910
Austin, TX 78768

RE: Request For Information – Interim Charge 1: HB 2899

Chairman Leach and Committee Members:

Thank you for the opportunity to submit testimony and comments on Interim Charge 1 – HB 2899 to the House Committee on Judiciary and Civil Jurisprudence. The American Council of Engineering Companies of Texas (ACEC Texas) is the business association of Texas engineering firms, representing over 450 firms practicing in a variety of engineering disciplines.

The passage of House Bill 2899 during the 86th Legislative Session stipulating that highway construction contractors are not liable for design defects partially addressed a nationwide debate on a complex issue in the construction industry. These debates can be attributed to two differing court cases: 1.) *Loneragan v. San Antonio Loan & Trust Co.*, in which the Texas Supreme Court found that a “contractor bore the risk and liability of a building collapse that was the result of defective design documents; and 2.) *United States v. Sperin*, which found that “the owner impliedly warrants the sufficiency of plans and specifications.”

In the construction industry, project liability typically falls on the three parties involved: the project owner (owner), the contractor, and the engineer and/or architect (designer). Customarily, the owner retains a designer to prepare drawings and specifications for the project, that are then bid out by the owner to a potential contractor to construct the project per the given design details. The ongoing debate has been whether the contractor should bore any liability if defects in the design are found. HB 2899, which takes a *Sperin* approach, removes the contractor as one of the three parties that may be held liable for project design defects.

The concern that ACEC Texas raised with HB 2899 was this would in turn shift liability to the owner, who would then likely seek action against the designer. Consequently, moving forward to reduce their own risks, owners would seek to contractually hold designers to an uninsurable, heightened standard of care, mandating “perfect” project plans and specifications. Moreover, professional liability insurance, which covers all practicing design professionals, will not cover a heightened standard of care provision in a project contract. Having a designer contractually held to a standard of care beyond the level that would be typically provided would leave the designer overly exposed to increased and uninsurable liability.

ACEC Texas worked with Chairman Leach and committee members to include language in HB 2899 that mandates the ordinary and reasonable standard of care to prevent uninsurable and unfair heightened standards of care. In essence, the standard of care language included requires that designers perform at the level of skill and care of other, similarly situated professionals engaged in similar work.

American Council of Engineering Companies of Texas

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As the Committee considers moving forward with discussions and potential legislation regarding *Sperin* and construction liability, we believe it to be imperative to include mandating the ordinary and reasonable standard of care to ensure protections for project designers. Allowing owners to contractually hold a designer to a heightened standard of care would create new liability and insurability concerns.

Thank you for the opportunity to submit testimony and please contact Scott Stewart, Vice President for Legislative Affairs, at (512) 474-2653 or Scott@ACECTX.org if you have any questions.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'S. Stewart', written over a faint, circular, dotted-line watermark or background.

Scott Stewart
Vice President for Legislative Affairs
ACEC Texas